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11

12 **UNITED STATES DISTRICT COURT**  
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 MICHAEL GREENSTEIN, CYNTHIA  
15 NELSON, and SINKWAN AU, individually  
16 and on behalf of themselves and all other  
persons similarly situated,

17 Plaintiffs,

18 vs.

19 NOBLR RECIPROCAL EXCHANGE,

20 Defendant.

21 CASE NO. 4:21-cv-04537-JSW

22 The Honorable Jeffrey S. White

23 **DEFENDANT'S NOTICE OF MOTION  
AND MOTION TO DISMISS  
PLAINTIFFS' SECOND AMENDED  
CLASS ACTION COMPLAINT  
PURSUANT TO FEDERAL RULE OF  
CIVIL PROCEDURE 12(b)**

24 Hearing Date: June 17, 2022

Hearing Time: 9:00 a.m.

Courtroom: No. 5, 2nd Floor  
Address: U.S. Courthouse  
1301 Clay Street  
Oakland, CA 94612

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## **NOTICE OF MOTION**

PLEASE TAKE NOTICE that on June 17, 2022, at 9:00 a.m., or as soon thereafter as the matter may be heard in the above-entitled Court, located at Oakland Courthouse, Courtroom 5 – 2nd Floor, 1301 Clay Street, Oakland, CA 94612, Defendant Noblr Reciprocal Exchange (“Noblr”) will move this Court to dismiss Plaintiffs’ Second Amended Class Action Complaint [Dkt. No. 38] (“Complaint”) filed by Plaintiffs Michael Greenstein, Cynthia Nelson, and Sinkwan Au, individually and on behalf of themselves and all other persons similarly situated (“Plaintiffs”) pursuant to Federal Rule of Civil Procedure 12(b).

This motion is made on the grounds that the Court lacks subject matter jurisdiction under Rule 12(b)(1) and also that Plaintiffs fail to state a viable claim under Rule 12(b)(6). *First*, Noblr seeks dismissal of all claims for lack of Article III standing under Rule 12(b)(1) because Plaintiffs fail to allege an injury-in-fact that is fairly traceable to Noblr’s conduct (and not that of the cyber attackers) and which will be redressed by a favorable decision. *Second*, Plaintiffs’ Drivers’ Privacy Protection Act (“DPPA”) claim fails because they do not sufficiently and factually allege that Noblr caused a “disclosure,” acted with the requisite intent, or disclosed information for an impermissible purpose under the DPPA. *Third*, the economic loss doctrine precludes Plaintiffs’ negligence claim. *Fourth*, Plaintiffs’ California Unfair Competition Law (“UCL”) claim fails because Plaintiffs have adequate available legal remedies, and also because they do not allege any predicate unlawful, fraudulent, or unfair conduct, or any other cognizable injury. *Finally*, Plaintiffs cannot pursue an independent cause of action for declaratory and injunctive relief, as they attempt under the federal Declaratory Judgment Act (“DJA”).

DATED: April 15, 2021

EVERSHEDS SUTHERLAND (US) LLP

By /s/ Francis X. Nolan  
Francis X. Nolan

*Attorney for Noblr Reciprocal Exchange*

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

2 In its Order [Dkt. No. 37] dismissing Plaintiffs' Corrected First Amended Complaint  
3 ("FAC") [Dkt. No. 16], this Court found that Plaintiffs failed to plausibly plead any element of the  
4 "irreducible constitutional minimum" to confer Article III standing. In their Second Amended  
5 Class Action Complaint ("Complaint") [Dkt. No. 38], Plaintiffs allege no new facts that would  
6 alter the Court's findings. *See* Dkt. No. 38-1 ("Amendments"). For example:

- 7 • No Imminent Risk of Harm: Plaintiffs still only plead that names, addresses, and driver's  
8 license numbers ("DLNs") were possibly stolen during the cyberattack.
- 9 • No Lost Value: Plaintiffs still do not plead that: (a) their personal information ("PI") lost  
10 value; (b) they had a market for and plans to sell their PI; (c) they were impaired from  
11 participating in that market; and (d) they suffered tangible, monetary, or property loss.
- 12 • No Mitigation Costs: Plaintiffs offer no new facts as to how Plaintiffs Greenberg and Nelson  
13 incurred mitigation costs. The Amendments only generally allege that Plaintiff Au was unable  
14 to sign into her my.ny.gov account and that, in March 2022, the darknet had a driver's license  
15 and student ID available for sale with her "unusual" name.
- 16 • Not Traceable: Plaintiffs assert that their injuries were the result of the subject breach because  
17 they were not given notice of any other data breach. Yet they acknowledge that, "[i]n most  
18 cases, stolen data is rarely attributed to the source when it is sold" and the processing of stolen  
19 data "mak[es] attribution to the source very difficult."
- 20 • Not Redressable: Plaintiffs do not plead any new facts on this issue.

21 In dismissing the FAC, the Court made clear what facts Plaintiffs must plead to satisfy  
22 Article III standing. Yet Plaintiffs do not rectify their prior pleading deficiencies. Instead, they use  
23 their Amendments to disagree with the Court’s reasoning. For example, Plaintiffs now assert that  
24 DLNs are more valuable than social security numbers, and that speculative causation is sufficient.  
25 The Court should dismiss the new Complaint for the same reasons it dismissed the FAC.

26 Even if Plaintiffs had standing, their Complaint fails to state any claim for relief. *First*, the  
27 Drivers' Privacy Protection Act ("DPPA") claim (Count 1) fails because Plaintiffs do not plead  
28 that Noblr caused a "disclosure" under the DPPA, or disclosed the information knowingly or for

1 an impermissible purpose. *Second*, Plaintiffs' negligence claim (Count 2) fails under the economic  
 2 loss doctrine as Plaintiffs' scant references to non-economic damages are too speculative and  
 3 generalized to support a negligence claim and they do not adequately plead an exception to this  
 4 rule. *Third*, Plaintiffs' California Unfair Competition Law ("UCL") (Count 3) claim fails because  
 5 there are other adequate legal remedies available and monetary damages would provide adequate  
 6 relief for the purported injuries. Plaintiffs also improperly bring legal and equitable claims based  
 7 on the same factual predicates, and, separately, fail to set forth any other cognizable injury.  
 8 *Fourth*, Plaintiffs fail to establish they are entitled to declaratory and injunctive relief (Count 4),  
 9 which are remedies and not independent causes of action.

#### 10 **FACTUAL ALLEGATIONS**

11 The factual allegations in the Complaint are not materially different than those in the FAC.  
 12 Noblr is an insurance reciprocal exchange that maintains a public-facing instant quote feature to  
 13 provide tailored insurance quotes. *See* Compl. ¶ 25. This feature works by ingesting an  
 14 individual's information via Noblr's webform and using it to get additional information, including  
 15 DLNs, from an outside service provider. *Id.*

16 On January 21, 2021, Noblr's web team noticed unusual quote activity consisting of a  
 17 spike in unfinished quotes through its instant quote webpage. *Id.* Noblr immediately launched an  
 18 internal investigation that revealed that attackers may have initiated quotes using information they  
 19 already possessed (i.e., names and dates of birth) to obtain DLNs inadvertently included in the  
 20 page source code. *Id.* On January 25, 2021, Noblr's security team began blocking suspicious IP  
 21 addresses. *Id.* On January 27, 2021, when Noblr determined that the attackers were able to access  
 22 DLNs, Noblr altered its instant quote system to prevent further access by the attackers and took  
 23 other steps to combat these attacks. *Id.*

24 Noblr invested time and money to remedy the situation, including blocking suspicious IP  
 25 addresses, revising rate limit thresholds to adjust traffic patterns, and altering the instant quote  
 26 system to mask DLNs in the source code and in the final application page. *Id.* Noblr developed  
 27 and employed changes to processes and protocols to prevent this type of event from happening  
 28 again. *Id.* Noblr communicated the chain of events to Plaintiffs in Notice Letters distributed in

1 May 2021 (“Notice Letters”). In the Notice Letters, Noblr also explained that Plaintiffs’ names,  
 2 DLNs, and addresses may have been accessed. *Id.* Noblr explained that it takes its responsibility to  
 3 safeguard PI seriously, and offered one-year complimentary access to Experian’s IdentityWorks.  
 4 *Id.* ¶ 25. Plaintiffs do not allege that they accepted Noblr’s offer.

5 Three Plaintiffs, California residents none, unharmed all, filed a putative class action after  
 6 receiving Notice Letters. Plaintiff Greenstein (New Jersey) does not allege that his information  
 7 was misused following the breach. *See Compl.* ¶¶ 79 – 83. He purportedly researched mitigation  
 8 options in response to receiving a Notice Letter. *Id.* ¶ 80. Plaintiff Nelson (Massachusetts) alleges  
 9 that he notified his financial advisors, contacted the police, and researched mitigation options, also  
 10 despite no misuse of his information following the breach. *Id.* ¶¶ 85 – 87. Plaintiff Au (New York)  
 11 alleges that her information was used to make a fraudulent application for unemployment benefits.  
 12 She does not allege that the fraudulent application caused her (as opposed to a governmental  
 13 agency) any actual harm. *Id.* ¶¶ 91 – 94. She now alleges she was prevented from “conducting  
 14 ordinary business” as she was unable to sign into her my.ny.gov account and that, in March 2022,  
 15 the darknet had a driver’s license and student ID available for sale with her “unusual” name. *Id.* ¶¶  
 16 93 and 97. Plaintiff Au purchased a family plan credit monitoring program. *Id.* ¶ 94. Plaintiffs  
 17 admit that, “stolen data is rarely attributed to the source when it is sold” and the processing of  
 18 stolen data “mak[es] attribution to the source very difficult.” *Id.* ¶ 96.

19 **ARGUMENT**

20 **I. THE COURT LACKS SUBJECT MATTER JURISDICTION.**

21 A court lacks subject matter jurisdiction over a matter if a plaintiff does not have standing  
 22 under Article III of the U.S. Constitution. *See FED. R. CIV. P. 12(b)(1); TransUnion LLC v.*  
 23 *Ramirez*, 141 S. Ct. 2190, 2197 (2021). Once a party has moved to dismiss under Rule 12(b)(1),  
 24 the opposing party bears the burden of establishing the court’s jurisdiction. *See Chandler v. State*  
 25 *Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). This requires the non-movant  
 26 demonstrate through allegations of “specific facts plausibly explaining” why the standing  
 27 requirements are met. *Barnum Timber Co. v. EPA*, 633 F.3d 894, 899 (9th Cir. 2011). This  
 28 includes pleading that a plaintiff has suffered a cognizable injury sufficient to satisfy the “case or

1 “controversy” requirement of Article III. *Clapper v. Amnesty Int’l. USA*, 568 U.S. 398, 423 (2013).  
 2 To meet the irreducible constitutional minimum for standing, a plaintiff must have (1) suffered an  
 3 injury-in-fact, (2) that is fairly traceable to the challenged conduct, and (3) will be redressed by a  
 4 favorable decision. *Spokeo v. Robins*, 578 U.S. 330, 338 (2016). In a class action, the named  
 5 plaintiff “must allege and show that [h]e personally ha[s] been injured, not that injury has been  
 6 suffered by other, unidentified numbers of the class.” *Agans v. Uber Technologies, Inc.*, No. 2:18-  
 7 cv-02970-PSG-GJSx, ECF 72, pp. 1-2 (C.D. Cal. August 19, 2019) (citation omitted). If the  
 8 named plaintiff cannot establish the requisite case or controversy, “none may seek relief on behalf  
 9 of himself or any other members of the class.” *Id.* Where, as here, a plaintiff has previously  
 10 amended a complaint, a district court has broad discretion to deny further leave to amend. *Allen v.*  
 11 *City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (applies to Rule 12(b)(1) & (6) analyses).

12           **A. Plaintiffs Still Fail to Plausibly Plead a Concrete Injury-in-Fact.**

13           Plaintiffs must allege they suffered “an invasion of a legally protected interest which is (a)  
 14 concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Magadia*  
 15 *v. Wal-Mart Assocs.*, 999 F.3d 668, 674 (9th Cir. 2021). Plaintiffs do not allege an injury-in-fact  
 16 because their allegations of harm are general, conclusory, implausible, and nearly non-existent.

17           **1. Imminent risk of future identity theft and harm.**

18           For Plaintiffs to recover for a threatened future injury, they must do more than allege that a  
 19 future injury is *possible*, which they cannot do. They must instead allege the threatened injury is  
 20 “certainly impending.” *In re Zappos.com, Inc. (Zappos)*, 888 F.3d 1020, 1026 (9th Cir. 2018)  
 21 (quoting *Clapper*, 568 U.S. at 409). In dismissing the FAC, the Court correctly held that,  
 22 “[b]ecause the exposed PI was limited only to Plaintiffs’ names, address, and [DLNs], ...  
 23 Plaintiffs did not sufficiently alleged the credible threat of future identity theft needed to plead  
 24 injury in fact.” *Greenstein v. Noblr Reciprocal Exch.*, No. 21-cv-04537-JSW, 2022 WL 472183, at  
 25 \*15 (N.D. Cal. Feb. 14, 2022). “[T]he injury-in-fact requirement will be satisfied when highly  
 26 sensitive personal data, such as social security numbers and credit card numbers, are  
 27 inappropriately revealed to the public and increase the risk of immediate future harm to the  
 28 plaintiff.” *Id.* at \*10. “Conversely, [DLNs] do not provide hackers with a clear ability to commit

1 fraud and are considered not as sensitive as social security numbers.” *Id.* (citing *Antman v. Uber*  
 2 *Techs., Inc. (Antman II)*, No. 15-CV-01175-LB, 2018 WL 2151231, at \*10 (N.D. Cal. May 10,  
 3 2018)). Indeed, DLNs are simply not the kind of data – like Social Security numbers, credit card  
 4 information, or tax identification numbers – that typically support successful breach class actions.  
 5 *See id.* at \*6-8; *In re Zappos*, 888 F.3d at 1026; *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143  
 6 (9th Cir. 2010); *Antman v. Uber Techs., Inc. (Antman I)*, No. 3:15-cv-01175-LB, 2015 WL  
 7 6123054, \*29 (N.D. Cal. Oct. 19, 2015); *In re Adobe Sys., Inc. Priv. Litig.*, 66 F. Supp. 3d 1197,  
 8 1214 (N.D. Cal. Sept. 4, 2014); *Agans*, No. 2:18-cv-02970-PSG-GJS, ECF 72, at pp. 2, 6.  
 9 Plaintiffs do not alter their allegations of what data was stolen, i.e., DLNs. *See* Compl. ¶¶ 28, 82,  
 10 88, 98, 106.

11       As did the FAC, the Complaint fails to explain how Plaintiffs face a credible risk of  
 12 immediate harm. There have been no attempts to defraud, steal from, or otherwise harm Plaintiffs  
 13 following the cyberattack, and it is not plausible based on what was stolen that such attempts are  
 14 imminent. Plaintiffs Greenstein and Nelson still do not identify a single instance where their PI  
 15 was used for nefarious purposes or otherwise. Plaintiff Au continues to fail to allege actual or  
 16 imminent harm that she suffered arising from the application for unemployment benefits, her  
 17 inability to log into her my.ny.gov account, or by discovering the presence of identification cards  
 18 on the darknet with her “unique” name. The Court would have to hypothesize possibilities of  
 19 future harm to find that Plaintiffs face a risk of imminent identity theft based on the limited  
 20 amount of PI at issue here.

21           **2.       Loss of value of PI.**

22       This Court’s prior holding that the allegations of diminished value of PI were insufficient  
 23 to establish injury under Article III should still stand, because Plaintiffs still do not plead that: (a)  
 24 their PI became less valuable after the cyberattack, (b) they had a market for and plans to sell that  
 25 PI, (c) they were impaired by the cyberattack from participating in that market; and (d) they  
 26 suffered tangible, monetary, or property loss. *Greenstein*, 2022 WL 472183, at \*16-17.

27       Plaintiffs generally allege diminution of their PI value and that their PI has value on the  
 28 black market. *See* Compl. ¶¶ 82, 88, 98. But, Plaintiffs still do not allege *how* their PI became less

1 valuable following the theft. *See In re Zappos.com, Inc.*, 108 F. Supp. 3d 949, 954 (D. Nev. 2015),  
 2 *rev'd on other grounds*, *In re Zappos.com, Inc.*, 888 F.3d 1020 (9th Cir. 2018). As the Court  
 3 explained, Plaintiffs cannot rely on a loss of privacy to demonstrate diminution in value. *See*  
 4 *Greenstein*, 2022 WL 472183, at \*16 (citing *Svenson v. Google Inc.*, No. 13-cv-04080-BLF, 2016  
 5 WL 8943301, at \*9 (N.D. Cal. Dec. 21, 2016), and *Razuki v. Caliber Home Loans, Inc.*, No. 17-  
 6 CV-1718-LAB (WVG), 2018 WL 6018361, at \*1 (S.D. Cal. Nov. 15, 2018)).

7 Next, the Court was clear that, “to successfully demonstrate injury in fact by diminution in  
 8 value of PI, Plaintiffs must ‘establish both the existence of a market for her [PI] and an  
 9 impairment of her ability to participate in that market.’” *Id.* at \*15 (citations omitted). Plaintiffs’  
 10 amended complaint does not do so. Furthermore, the Court held that “to establish standing,  
 11 plaintiffs must show that the loss of value is not arbitrary or hypothetical.” *Id.* at \*15-16 (citing *In*  
 12 *re Facebook, Inc., Consumer Priv. User Profile Litig. (In re Facebook)*, 402 F. Supp. 3d 767, 784  
 13 (N.D. Cal. 2019)). Plaintiffs do not meet that threshold. A bare “contention that [a plaintiff]  
 14 suffered a ‘loss of value of [his] private information,’ … without any more details, is ‘too abstract  
 15 and speculative to support [A]rticle III standing.’” *Agans*, No. 2:18-cv-02970-PSG-GJS, ECF 72,  
 16 at p. 7.

17 **3. Out-of-pocket monitoring costs, lost time, and inchoate harm.**

18 The Court also held that Plaintiffs’ effort and costs attempting to mitigate harm from the  
 19 breach were lacking because the nature of the stolen information was not sufficiently sensitive.  
 20 *Greenstein*, 2022 WL 472183, at \*18-19. Plaintiffs offer no novel or more specific facts that  
 21 would compel a different finding on a renewed motion to dismiss. *See* Compl. ¶ 108 (alleging  
 22 mitigation costs, i.e., monitoring services, and lost time associated therewith).

23 As the Court recognized, “mitigation expenses do not qualify as injury; the risk of identity  
 24 theft must first be real and imminent, and not speculative, before mitigation costs establish injury  
 25 in fact.” *Greenstein*, 2022 WL 472183, at \*19 (citation omitted). Plaintiffs must show that the  
 26 mitigation costs were reasonable and necessary. *Id.* “[I]n the absence of an imminent risk of harm,  
 27 Plaintiffs cannot manufacture standing through costs incurred in monitoring their credit.” *Id.* at  
 28 \*20. Here, the stolen data is not sensitive enough to trigger an imminent threat of future harm.

1 Associated monitoring costs are thus not reasonable or necessary, but instead arise from alleged  
 2 fears of hypothetical future harm that is not certainly pending. *See supra*, sec. 1.A. Moreover, that  
 3 an unknown person is selling identification cards using Plaintiff Au’s “unusual” name does not  
 4 mean that was a reasonably certain consequence of Noblr’s actions. Finally, Plaintiffs’ conclusory  
 5 allegations of anxiety, emotional distress, and loss of privacy, (*see Compl. ¶ 149*), are insufficient  
 6 to confer standing. *See Travis v. Assured Imaging LLC*, No. CV-20-00390-TUC-JCH, 2021 WL  
 7 1862446, at \*\*6, 28 (D. Ariz. May 10, 2021).

8                   **B. Plaintiffs Fail to Plausibly Plead a Traceable Injury.**

9                   Article III requires “a causal connection between the injury and the conduct complained  
 10 of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . .  
 11 . th[e] result [of] the independent action of some third party not before the court.’” *Antman*, 2018  
 12 WL 2151231, at \*23-24 (citations omitted); *see also Washington Env’t. Council v. Bellon*, 732  
 13 F.3d 1131, 1141 (9th Cir. 2013); *Agans*, No. 2:18-cv-02970-PSG-GJS, ECF 72 at p. 8 (finding no  
 14 traceable injury in breach case involving DLNs).

15                   In dismissing the FAC, the Court held that, “[n]ow or in the future, it would be difficult to  
 16 trace any future identity theft or fraud to Noblr’s specific [cyberattack].” *Greenstein*, 2022 WL  
 17 472183, at \*12. In their Complaint, Plaintiffs do not offer any new facts to trace their purported  
 18 harm, such as it is, to Noblr’s conduct. To the contrary, Plaintiffs concede that, “[i]n most cases,  
 19 stolen data is rarely attributed to the source when it is sold,” and that “stolen data is often  
 20 obfuscated, parsed, and sold in pieces [and] also often combined with other stolen data, further  
 21 making attribution to the source very difficult.” *See Compl. ¶ 96*. Any injuries were the result of  
 22 the cyber attackers’ independent actions. *See Ass’n of Pub. Agency Customers v. Bonneville Power*  
 23 *Admin.*, 733 F.3d 939, 953 (9th Cir. 2013).

24                   Plaintiffs rely on Noblr’s purported delay in sending Notice Letters to demonstrate a  
 25 substantial risk of harm. But the Court already found that allegation insufficient. *Greenstein*, 2022  
 26 WL 472183, at \*20-23 (“Plaintiffs do not trace any harm from Noblr’s delayed notification, and  
 27 cannot show a nexus between the alleged harm flowing from the delayed notification and Noblr’s  
 28 actions.”). That holding is consistent with other decisions finding that a mere delay of a breach

1 notice (here, just a few months) typically does not satisfy the “fairly traceable” requirement. *See,*  
 2 *e.g., In re Adobe*, 66 F. Supp. 3d at 1211, 1217-18; *Razuki*, 2018 WL 6018361, at \*2; *Antman II*,  
 3 2018 WL 2151231 at \*23 (citing *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 695 (7th  
 4 Cir. 2015), and *Price v. Starbucks Corp.*, 192 Cal. App. 4th 1136, 1143 (2011)).

5 **C. Plaintiffs Fail to Plausibly Plead Redress By a Favorable Decision.**

6 The Court already held that injunctive or declaratory relief would not be able to redress  
 7 any future harm of identity theft or fraud because it could not compel the hackers or Noblr to  
 8 return the PI to Plaintiffs, and it would not motivate Noblr to change its practices as Noblr already  
 9 took immediate action to remedy its unintentional disclosure by changing its policies and masking  
 10 DLTs in the page source code. *Greenstein*, 2022 WL 472183, at \*25. Plaintiffs offer no new or  
 11 more specific facts that would compel a different holding now.

12 Plaintiffs must allege an injury that “is likely to be redressed by a favorable decision.”  
 13 *Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*, No. 3:16-cv-00014-GPC-BLM, 2016 WL  
 14 6523428, at \*7-8 (S.D. Cal. 2016). Here, Plaintiffs must “allege and show that they personally  
 15 have been injured, not that injury has been suffered by other, unidentified members of the class to  
 16 which they belong and which they purport to represent.” *Greenstein*, 2022 WL 472183, at \*24  
 17 (internal citations omitted). Nothing Plaintiffs now plead changes what the Court already ruled: “If  
 18 none of the named plaintiffs purporting to represent a class establishes the requisite of a case or  
 19 controversy with the defendants, none may seek relief on behalf of [herself] or any other member  
 20 of the class.” *Id.* Plaintiffs do not allege any injury-in-fact Noblr caused. If another person suffered  
 21 such harm, that person must pursue their own claim.

22 Moreover, Plaintiffs’ request for injunctive relief is inappropriate because they still are not  
 23 “realistically threatened by a repetition of [their] experience . . . likely redressed by a favorable  
 24 decision.” *Id.* at \*25; *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). This Court  
 25 was clear that an injunction may not be based on a “fear of on-going data breaches,” because “an  
 26 order requiring Defendants to enhance their cybersecurity in the future (or an equivalent  
 27 declaratory judgment) will not provide any relief for past injuries or injuries incurred in the future  
 28 because of a data breach that has already occurred.” *Id.* at \*25-26. Rather, “the [injunctive] relief

1 afforded would be mostly ‘psychic satisfaction’” that is not an acceptable Article III remedy. *Id.* at  
 2 \*27 (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998) (“Relief that does not  
 3 remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence  
 4 of the redressability requirement.”)).

5 **II. THE COURT SHOULD DISMISS FOR FAILURE TO STATE A CLAIM.**

6 Should the Court find that one or more Plaintiffs satisfies the Article III standing  
 7 requirement, it should still dismiss the Complaint pursuant to Rule 12(b)(6). The Court’s “inquiry  
 8 is limited to the allegations in the complaint.” *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588  
 9 (9th Cir. 2008). Even under the liberal pleading standard of Rule 8(a)(2), “a plaintiff’s obligation  
 10 to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions,  
 11 and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v.*  
 12 *Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs must not merely allege conceivable conduct, but  
 13 they must instead allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at  
 14 570. Where, as here, a plaintiff has previously amended a complaint, a district court has broad  
 15 discretion to deny further leave to amend. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th  
 16 Cir. 1990) (internal quotations and citation omitted).

17 **A. Plaintiffs’ Drivers’ Privacy Protection Act Claim.**

18 To plead a successful DPPA claim, Plaintiffs must allege that Noblr (1) knowingly (2)  
 19 obtained, disclosed, or used PI, (3) from a motor vehicle record, (4) for a purpose not permitted.  
 20 *See* 18 U.S.C.A. § 2724(a); *Howard v. Criminal Info. Servs.*, 654 F.3d 887, 890-91 (9th Cir.  
 21 2011). At minimum, Plaintiffs still do not plausibly allege that Noblr caused a “disclosure” under  
 22 the DPPA, that Noblr acted knowingly, or that Noblr disclosed for an improper purpose.

23 **1. Noblr did not cause a “disclosure” or have the requisite level of intent.**

24 A precondition to DPPA liability is the defendant’s knowing and voluntary disclosure of  
 25 driving information. *See* 18 U.S.C.A. § 2724(a). Courts in similar situations have held that  
 26 negligent disclosure is insufficient. *See, e.g., Gulsvig v. Mille Lacs Cnty.*, No. 13-1309 (JRT/LIB),  
 27 2014 WL 1285785, at \*19 (D. Minn. 2014) (“nothing in the [DPPA] suggests that [it] imposes a  
 28 reasonable duty of care to safeguard information”); *Ray v. Anoka Cnty.*, 24 F. Supp. 3d 843, 848

1 (D. Minn. 2014) (“the DPPA does not permit suit for negligent disclosure”).

2 The plaintiffs in *Vertafore* alleged their DLNs were accessed “in response to the  
 3 commands of unauthorized individuals” from unsecured external storage “consistent with the [way  
 4 the storage was] programmed and configured by Vertafore.” *See Allen v. Vertafore, Inc.*, No. 4:20-  
 5 cv-04139, 2021 WL 3148870, \*\*2, 9 (S.D. Tex. June 14, 2021), *aff’d*, 2022 WL 765001 (5th Cir.  
 6 Mar. 11, 2022, No. 21-20404). In dismissing the DPPA claim, the court held that, “anyone that  
 7 may have obtained the data did so in an unauthorized manner, which undercuts the notion that  
 8 Vertafore knowingly disclosed the data.” *Id.* The court pointed to the defendant’s press release that  
 9 explained the data was “inadvertently stored” in unsecured storage and described remedial efforts.  
 10 *Id.* at \*10. In March 2022, the Fifth Circuit affirmed on the additional basis that the plaintiffs had  
 11 not alleged a “disclosure” under the DPPA. *See id.* at 2022 WL 765001, at \*1. “Nothing about the  
 12 words ‘unsecured’ or ‘external’ implies exposure to public view, and the mere fact that  
 13 unauthorized users managed to access the information does not imply that Vertafore granted or  
 14 facilitated that access.” *Id.* at \*7-8.

15 The plaintiffs in *Enslin* alleged their PI was compromised after a former employee stole  
 16 company laptops containing DLNs. *See Enslin v. The Coca-Cola Co.*, 136 F. Supp. 3d 654, 658  
 17 (E.D. Pa. 2015), *aff’d sub nom.*, 739 F. App’x 91 (3d Cir. 2018). That court dismissed the DPPA  
 18 claim, finding the employer did not knowingly or voluntarily disclose the PI by storing it on the  
 19 laptops. *Id.* at 671. Rather, it was a thief who acted knowingly. *Id.* “[P]rivate holding [PI], even  
 20 in an unsecured manner, does not constitute a ‘voluntary disclosure’ under the DPPA.” *Id.*

21 Here, Noblr did not knowingly or voluntarily disclose any data or cause a disclosure.  
 22 Noblr’s webpage was merely the tool that attackers used to perpetrate their scheme. Plaintiffs still  
 23 do not challenge that assessment, which was communicated in the Notice Letters. *See Compl. ¶¶*  
 24 4, 25 (“The initial investigation revealed that attackers may have initiated these quotes in order to  
 25 steal [DLNs] which were *inadvertently included in the page source code.*”) (emphasis added).  
 26 Moreover, the website’s source code is hardly a publicly facing database, like *Welch v.*  
 27 *Theodorides-Bustle*, 677 F. Supp. 2d 1283, 1286 (N.D. Fla. 2010), or a publicly posted ticket, as in  
 28 *Senne v. Vill. Of Palatine*, 695 F. 3d 597, 600 (7th Cir. 2012). *See Compl. ¶¶ 20 – 22, 27, 72 – 78,*

1 133, 140, 146. In sum, hackers manipulated Noblr's system using PI previously acquired to access  
 2 the source code and obtain DLTs. Those allegations cannot give rise to a DPPA claim.

3 **2. Noblr did not disclose information for an impermissible purpose.**

4 Another precondition to DPPA liability is that the defendant obtained, disclosed, or used a  
 5 person's driving information for an impermissible purpose. *See* 18 U.S.C.A. § 2724(a). Courts  
 6 have dismissed DPPA claims against insurance companies where the plaintiffs' PI was used for  
 7 the purpose of facilitating customer access to insurance. For example, the *Vertafore* court found no  
 8 basis for finding improper purpose within the plaintiffs' allegations that an insurance software  
 9 company stored data within unsecured external storage accessed without authorization. *See*  
 10 *Vertafore*, 2021 WL 3148870, at \*9-10. That court reasoned that the plaintiffs, "clearly detail that  
 11 '[the defendant] is an insurance software company that provides enterprise software solutions' for  
 12 the insurance industry [and thus the defendant's] purpose of managing the affected data files is a  
 13 covered permissible use." *Id.* Here, Plaintiffs still do not and cannot show that Noblr obtained,  
 14 disclosed, or otherwise used their personal data for any improper purpose. Noblr is an insurance  
 15 company that processes and stores personal data entered into its website and also retrieves  
 16 additional information from third-party providers in order to provide insurance quotes. Again,  
 17 Plaintiffs' alleged impermissible disclosure relates to third-party cyber attackers, not Noblr.

18 **B. Plaintiffs' Negligence Claim.**

19 Plaintiffs fail to allege an exception to the economic loss doctrine and do not allege viable  
 20 non-economic damages. As a result, their negligence claim should be dismissed.<sup>1</sup>

21 **1. The economic loss doctrine precludes recovery for economic damages.**

22 This Court has relied on the economic loss doctrine in dismissing negligence claims in  
 23 similar cases. *See Gardiner v. Walmart Inc.*, No. 4:20-cv-04618-JSW, 2021 U.S. Dist. LEXIS  
 24 211251, \*24 (N.D. Cal. July 28, 2021) (dismissing amended complaint) (White, J.); *Gardiner v.*  
 25 *Walmart Inc.*, No. 4:20-cv-04618-JSW, 2021 WL 2520103, \*23 (N.D. Cal. March 5, 2021)  
 26 (dismissing original complaint) (White, J.). The doctrine holds that, "[i]n the absence of (1)

27  
 28 <sup>1</sup> In the event this litigation proceeds to class certification, Noblr does not concede that  
 California law applies to Plaintiffs.

1 personal injury, (2) physical damage to property, (3) a ‘special relationship’ existing between the  
 2 parties, or (4) some other common law exception to the rule, recovery of purely economic loss is  
 3 foreclosed.” *See Gardiner*, 2021 WL 2520103, at \*23 (citing *In re Sony Gaming Networks &*  
 4 *Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 967 (S.D. Cal. 2014)).

5 The Court should dismiss Plaintiffs’ negligence claim for the same reasons. Plaintiffs do  
 6 not allege personal injury or physical property damage. Plaintiffs concede that they did not enjoy a  
 7 special relationship with Noblr. *See Compl.* ¶ 26 (“The Notice confirms that Plaintiffs became  
 8 victims … even though they did not have a prior relationship with Noblr,” advising “you may be  
 9 affected even if you have no relationship with Noblr.”); *see also id.* ¶¶ 8 – 10 (Plaintiffs “never  
 10 sought a quote for insurance of any sort from Defendant”). Nor do Plaintiffs allege that any  
 11 specific benefit was intended for them relative to other individuals. Plaintiffs also acknowledge  
 12 that seven of the eight types of alleged harm are economic. *Id.* ¶¶ 109 and 149. These include the  
 13 same or similar damages allegations within the negligence claim associated with the use, theft, and  
 14 publication of PI (¶ 108.a. and ¶ 149 (i) and (ii)); out-of-pocket expenses for prevention, detection,  
 15 and recovery (¶ 108.b. and ¶ 149 (iii) and (v)); lost opportunity, loss of productivity, and  
 16 mitigation efforts (¶ 108.c. and ¶ 149 (iv)); continued risk to the PI (¶ 108.d. and ¶ 149 (vii)); and  
 17 future costs in terms of time, effort, and money at ¶ 108.e. and ¶ 149 (viii).

18 **2. Plaintiffs fail to allege viable non-economic damages claims.**

19 At best, Plaintiffs’ non-economic harm allegations amount to: “an undeniable interest in  
 20 ensuring that their [PI] is secure, remains secure, and is not subject to further misappropriation or  
 21 theft,” and “anxiety, emotional distress, loss of privacy, and other economic and non-economic  
 22 losses.” *Id.* ¶¶ 109 and 149 (vi). California courts have found in data breach cases involving lost  
 23 PI that an “appreciable, nonspeculative, present harm is an essential element of a negligence cause  
 24 of action,” and a breach causing only speculative harm or the threat of future harm does not  
 25 normally suffice. *In re Sony Gaming*, 903 F. Supp. 2d at 962-63; *In re iPhone Application Litig.*,  
 26 844 F. Supp. 2d 1040, 1064 (N.D. Cal. 2012) (holding that “increased, unexpected, and  
 27 unreasonable risk to the security of sensitive” PI was “too speculative to support a claim for  
 28 negligence”); *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1032 (N.D. Cal. 2012) (dismissing a

1 negligence claim where plaintiffs failed to allege an “appreciable, nonspeculative, present injury”).

2 The same is true here. At minimum, the New Jersey and Massachusetts Plaintiffs do not  
 3 factually allege that their PI accessed via Noblr’s website has been misused, or otherwise show  
 4 they suffered some form of appreciable, nonspeculative, present injury. The alleged future harm  
 5 (supporting their mitigation efforts and injunctive relief) remains vague at best.

6 **3. Plaintiffs otherwise fail to allege cognizable damages.**

7 *a. Loss of Value of PI*

8 To sufficiently allege diminution of value of PI, Plaintiffs must plead the existence of a  
 9 market for the PI, and that they have been deprived of the ability to participate in that market. *See*  
 10 *Svenson*, 2016 WL 8943301, at \*9. General diminution allegations are insufficient. *See Pruchnicki*  
 11 *v. Envision Healthcare Corp.*, 845 F. App’x 613, 615 (9th Cir. 2021) (“mere misappropriation of  
 12 [PI] does not establish compensable damages”) (citation omitted). Citations to studies explaining  
 13 how PI may have value are not enough if the pleadings do not allege how the specific plaintiff’s PI  
 14 actually lost value. *Id.* at 614-15. This is particularly true in the context of data breach class  
 15 actions. *See Razuki*, 2018 WL 6018361, at \*5. Plaintiffs generally refer to the Notice Letters’  
 16 statement that their DLNs and addresses “*may* have been accessed” in support of their contention  
 17 that they have suffered “damages to and diminution in the value of [their] PI.” *See* Compl. ¶¶ 79,  
 18 82, 84, 88, 90, 98 (emphasis added). That is not enough to sustain their claim.

19 *b. Risk of Future Identity Theft and Harm.*

20 “[C]onclusory allegations of an increased risk of identity theft are insufficient to establish  
 21 injury as required for [...] negligence, contract, and UCL claims.” *See Gardiner*, 2021 WL  
 22 2520103, at \*12 (finding plaintiff only vaguely alleges an increased risk but does not offer specific  
 23 facts regarding the PI stolen, any misuse that occurred, and how the allegations amount to more  
 24 than a nonspeculative injury). “[W]ithout specific factual statements that Plaintiffs’ [PI] has been  
 25 misused, in the form of an open bank account, or un-reimbursed charges, the mere ‘danger of  
 26 future harm, unaccompanied by present damage, will not support a negligence action.”” *See In re*  
 27 *Sony Gaming*, 903 F. Supp. 2d at 963.

28 Plaintiffs’ allegations refer generally to the Notice Letters stating their DLNs and addresses

1 “may have been accessed,” and that they therefore face an “imminent and impending injury arising  
2 from the increased risk of fraud and identity theft.” See Compl. ¶¶ 79, 82, 84, 88, 90, 98 (emphasis  
3 added). The New Jersey and Massachusetts Plaintiffs do not allege specific facts regarding misuse.  
4 The New York Plaintiff alleges in conclusory fashion that, “[f]ollowing the Unauthorized Data  
5 Disclosure, in January 2021, Plaintiff Au’s data was fraudulently used to apply for unemployment  
6 benefits.” See Compl. ¶ 91. She does not allege that the reported fraud was the result of Noblr’s  
7 disclosure or caused her personal harm. Plaintiff Au concedes a *third-party* used her information  
8 to fraudulently apply for benefits *from a government agency. Id.*

### *c. Out-of-Pocket Monitoring Costs and Lost Time.*

10 For credit monitoring (costs and lost time) to be compensable, Plaintiffs must allege that  
11 their need for future monitoring is a reasonably certain consequence of Noblr’s purported breach  
12 of duty, and that the monitoring is reasonable and necessary. *See Corona v. Sony Pictures Ent.,*  
13 *Inc.*, No. 14-cv-09600-RGK, 2015 WL 3916744, \*4 (C.D. Cal. June 15, 2015) (monitoring costs  
14 sufficient where “most sensitive, nonpublic PII, which included Social Security numbers,  
15 employment files, bank account information, health and medical information, passport numbers,  
16 retirement plan data, and home and email addresses” were posted on file-sharing websites, copied  
17 over a million times, and used by hackers to threaten the release of additional PI). In contrast,  
18 monitoring costs are not reasonable based on general allegations of potential identity theft. *See*  
19 *Gardiner*, 2021 WL 2520103, \*15-16. Disclosed DLNs do not justify such costs or lost time.

### C. Plaintiffs' Unfair Competition Law Claim.

## 1. No lack of an adequate remedy.

22 Plaintiffs must lack another adequate remedy at law to pursue equitable remedies through a  
23 UCL claim. *See Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844-45 (9th Cir. 2020). Courts  
24 post-Sonner have dismissed such where plaintiffs simultaneously seek monetary relief. *See, e.g.*,  
25 *In re Macbook Keyboard Litig.*, No. 5:18-cv-02813-EJD, 2020 WL 6047253, at \*12 (N.D. Cal.  
26 Oct. 13, 2020) (collecting cases). Plaintiffs do not plead that they lack an adequate legal remedy  
27 but nonetheless pray for exhaustive injunctive relief. *See* Compl. at Prayer for Relief. Such an  
28 order would not provide relief for the alleged injuries, which arise from a temporary condition in

1 Noblr's page source code that Noblr already resolved. *Id.* ¶ 25; *Greenstein*, 2022 WL 472183, at  
 2 \*25 ("[i]njunctive ... relief would not be able to redress any future harm... Noblr already took  
 3 immediate action... masking [DLNs] in the page source code"). Nor would monetary damages  
 4 provide adequate relief for purported future harms. *See Clark v. Am. Honda Motor Co.*, No. CV  
 5 20-03147 AB (MRWx), 2021 WL 1186338, at \*8 (C.D. Cal. Mar. 25, 2021).

6 **2. Plaintiffs rely on the same factual predicate as their other claims.**

7 Equitable and legal claims based on the same factual predicate may not be asserted in the  
 8 alternative. *See Madrigal v. Hint, Inc.*, No. CV 17-02095-VAP (JCx), 2017 U.S. Dist. LEXIS  
 9 221801, at \*13 (C.D. Cal. Dec. 14, 2017); *Fonseca v. Goya Foods, Inc.*, No. 16-CV-02559-LHK,  
 10 2016 WL 4698942, at \*7 (N.D. Cal. Sept. 8, 2016). Plaintiffs seek equitable relief on the same  
 11 predicates of their other claims, and explicitly rely on the DPPA, the Federal Trade Commission  
 12 Act, the Gramm-Leach-Bliley Act, and California Civil Code § 1798. *See* Compl. ¶¶ 151 – 161.  
 13 Moreover, as with their negligence claim, Plaintiffs' UCL claim does not arise from an  
 14 independent cognizable injury. *See, supra*, at sec. II.B. Finally, the California statutes that form  
 15 the basis for the UCL claim are intended to protect PI "about *California residents*," which  
 16 Plaintiffs are not. *See* Cal. Civ. Code § 1798.81.5 (emphasis added).

17 **D. The Court Should Dismiss the Declaratory and Injunctive Relief Claim.**

18 Finally, Plaintiffs bring a claim for declaratory and injunctive relief under the federal  
 19 Declaratory Judgment Act ("DJA"). The DJA provides the Court with discretion to "declare the  
 20 rights and other legal relations of any interested party seeking such declaration" where there is an  
 21 "actual controversy." 28 U.S.C. § 2201. This is actually a request for remedy rather than an  
 22 independent cause of action. *See, e.g., Ajetunmobi v. Clario Mortg. Cap., Inc.*, 595 F. App'x 680,  
 23 684 (9th Cir. 2014). Plaintiffs do not set forth any specific, factual allegations of harm they will  
 24 suffer if the Court denies their vague request for injunctive relief. That is fatal to their DJA claim.

25 **CONCLUSION**

26 The Court should dismiss the Second Amended Complaint, with prejudice, for lack of  
 27 subject matter jurisdiction or, in the alternative, for failure to state a viable claim.  
 28

1 DATED: April 15, 2022

EVERSHEDS SUTHERLAND (US) LLP

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